MALAYSIAN REPORTS

Ganda Holdings Bhd v Pamaron Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO D2-31-156-88
SITI NORMA YAAKOB J
21 APRIL 1989

Companies and Corporations – Winding-up petition – Locus standi – Court order for specific performance of sale of shares – Order stipulating that defendant seller entitled to damages if plaintiff buyer failed to perform – Subsequent failure of plaintiff buyer to complete sale – Court order converted into money judgment – Defendant becomes a prospective creditor under s 217(1)(b) of Companies Act 1965 – Defendant has locus standi to present winding-up petition against plaintiff – Companies Act 1965, s 217(1)(b)

The defendant had earlier obtained a court order dated 13 February 1988 for specific performance of a sale and purchase agreement in which the plaintiff was to complete the purchase of some shares from the defendant by tendering the purchase price within 14 days from the date of the order. The plaintiff failed to complete the sale within the time stipulated and the defendant sent a notice to the plaintiff under s 218(1)(e) of the Companies Act 1965 ('the Act') demanding payment of the purchase sum under the judgment within 21 days, failing which the defendant would proceed to present a winding-up petition against the plaintiff. The defendant claimed that by virtue of the court order dated 13 February 1988, it is a judgment creditor and under s 217(1)(b) of the Act, it has the capacity to present a winding-up petition against the plaintiff. In an effort to prevent the defendant from presenting a winding-up petition against it, the plaintiff filed this originating summons seeking a declaration that under the order of court dated 13 February 1988, the defendant is not a creditor but is only a vendor and as such has no locus standi to present a winding-up petition against it.

Held, dismissing the plaintiff's application:

(1) The first limb of the order of court dated 13 February 1988 speaks of the performance of a contractual obligation on the part of the plaintiff and is not therefore a judgment for a specific sum of money which entitles the defendant to assume the status of a creditor. However, in the performance of its contractual obligation, the plaintiff is to tender a specific sum of money to the defendant within a specified period of time. Payment of this sum of money is not to be taken in isolation as to give rise to the conclusion that it is a judgment debt as the tender should be read and understood as the consequence of the order for specific performance, which is not a money judgment per se.

(2) When the tender was not made by the plaintiff, the fourth limb of the order comes into operation in that the defendant is now entitled to be paid damages by the plaintiff for such default, such damages to be assessed by the senior assistant registrar. By reason of this, the judgment has been converted into a money judgment and although the amount of damages has not yet been assessed, the fact that the defendant is now entitled to damages has changed the status of the defendant to that of a creditor and under s 217(1)(b) of the Companies Act, a contingent and prospective creditor of a company may petition to court for a winding-up order. By this statutory sanction, the decision in *In Re Pen-Y-Van Colliery Company*[1] is no longer good law.

Case referred to
1 *In Re Pen-Y-Van Colliery Company* (1877) 6 Ch D 477 (not folld)

Legislation referred to
Companies Act 1965 s 217(1)(b)

MS Murthi for the plaintiff.
D Goon for the defendant.

Cur Adv Vult

Siti Norma Yaakob J: The plaintiff in his suit is a public listed company, whose shares are traded on the stock exchanges of Malaysia and Singapore.

On 13 February 1988, in Civil Suit 22-174-86, the defendant had obtained an order from George J which, inter alia, provides that a sale and purchase agreement dated 1 February 1986, entered into between the plaintiff and the defendant, be specifically enforced by the plaintiff completing the purchase of 1,108,000 shares of $1 each fully paid in Seasion Corporation Sdn Bhd from the defendant and paying the defendant $845,970.91, being the purchase price of the shares within 14 days of the date of the order.

The plaintiff failed to complete the sale within the time stipulated and on 1 August 1988 the defendant sent a notice to the plaintiff under s 218(1)(e) of the Companies Act 1965 ('the Act'), demanding payment of the sum of $845,970.91 under the judgment within 21 days, failing which the defendant would proceed to present a winding-up petition against the plaintiff. On 16 August 1988, five days before the expiry of the 21 days stated in the notice, and in an effort to prevent the defendant from presenting a winding-up petition against it, the plaintiff filed this originating summons seeking, inter alia, a declaratory relief that under the order of court dated 13 February 1988, the defendant is not a creditor but is only a vendor and as such has no locus standi to present a winding-up petition against it.

Before me, Mr MS Murthi, counsel for the plaintiff, argued that since the threatened petition for winding up is based on the plaintiff's inability to pay its debt, the defendant will be presenting such a petition in its capacity as a creditor, under s 217(1)(b) of the Act, and since the Act contains no definition of the term 'creditor', the only issue raised in this originating summons is who in law can be treated as a creditor, and whether by the order of court dated 13 February 1988, the defendant can be regarded as one, to entitle it to present a winding-up petition against the plaintiff.

Text book writers have approached the subject in many ways. 7(2) *Halsbury's Laws of England*, 4th Ed, lists the following persons as creditors:

(1) the assignee of a debt, if the assignment is not made while the creditor's petition is pending;

(2) the equitable assignee of part of a debt;
(3) the executor of a creditor, even before probate;
(4) a creditor in respect of a debt incurred by voluntary liquidation;
(5) a secured creditor;
(6) a judgment creditor;
(7) the holder of a debenture bond of an insolvent company which has not yet matured for payment;
(8) generally any creditor whose debt is not genuinely disputed by the company on substantial grounds.

McPherson J in his book *The Law of Company Liquidation*, 3rd Ed, at p 45 sums up the situation in the following manner:

> It is obviously not easy to formulate a test, at once both simple and comprehensive, for determining who is entitled to apply for a winding up in the capacity of creditor. The applicant must be one who has a claim to be paid a sum of money by the company, but that sum need not be liquidated and it need not be presently payable. Nor is it essential that it should be recoverable by action for in *Re North Bucks Furniture Depositories Ltd* [1939] Ch D 690, a local authority, to which the company was indebted for unpaid rates, was held entitled to present a petition, although payment of its rates could be enforced only by distress and not by action. Conversely, the mere fact that there is some means of enforcing payment by the company is not itself sufficient to transfer the sum payable into a debt. A garnishee order does not as between the company and the garnishor create a relationship of debtor and creditor as to confer a right to have the company wound up. See the case of *In re Combined Weighing And Advertizing Machine Company* (1889) 43 Ch D 99.

It would appear that the facts of each case have to be closely examined to appreciate whether the relationship of a creditor and a debtor exists.

In this originating summons, the defendant claims that by virtue of the order of court dated 13 February 1988, it is a judgment creditor and under s 217(1)(b) of the Act, it has the capacity to present a winding-up petition against the plaintiff. To determine whether there is any merit to this contention, I shall now examine the order that was obtained on 13 February 1988 and for this purpose, I shall break it up into four limbs:

(1) Specific performance of the agreement dated 1 February 1986 which requires the plaintiff to purchase 1,108,000 shares in Seasion Corporation from the defendant by tendering $845,970.91, being the purchase price to the defendant within 14 days of the order. In other words, the plaintiff had to pay up by 27 February 1988 the latest.
(2) On receipt of such payment, the defendant had seven days within which to deliver the relevant share certificates together with the memorandum of transfer duly executed to the plaintiff or its nominee.
(3) If for any reason, the specific performance ordered cannot be performed, the parties are at liberty to apply.
(4) If the plaintiff failed to perform by 28 February 1988, the plaintiff shall pay damages to the defendant, such damages to be assessed by the senior assistant registrar.

From the order it is clear that the first limb speaks of the performance of a contractual obligation on the part of the plaintiff and is not therefore a judgment for a specific sum of money which entitles the defendant to assume the status of a creditor. However, in the performance of its contractual obligation, the plaintiff is to tender a specific sum of money, to the defendant within a specified period of time. Payment of this sum of money is not to be taken in isolation as to give rise to the conclusion that it is a judgment debt as the tender should be read and understood as the consequence of the order for specific performance, which is not a money judgment, per se.

However, when the tender was not made by the plaintiff on 28 February 1988, the fourth limb of the order comes into operation in that the defendant is now entitled to be paid damages by the plaintiff for such default, such damages to be assessed by the senior assistant registrar. By reason of this, the judgment has been converted into a money judgment and although the amount of damages has not yet been assessed, the fact that the defendant is now entitled to damages has changed the status of the defendant to that of a creditor and under s 217(1)(b) of the Act, a contingent and prospective creditor of a company may petition to court for a winding-up order. By this statutory sanction, the decision in the case of *In Re Pen-Y-Van Colliery Company*,[1] which is relied upon by the plaintiff, is no longer good law. In that case it was held that a claim for unliquidated damages for fraudulent representation does not make a man a creditor entitling him to present a petition for a winding-up. He must change the claim for damages into a judgment and thus make himself a creditor before he can petition the court.

A point was raised by the defendant in that this originating summons is misconceived and in form it is nothing more than a delaying tactic, as the issue as to whether the defendant is a creditor can be raised at the proper time in the winding-up petition itself. To this the plaintiff replied that by that time untold damage would have already been done to the plaintiff as being a public listed company, the presentation of the petition itself has the effect of suspending all dealings over the plaintiff's shares and that all its transactions will be void under s 219(2) read with ss 222-224 of the Act.

Much as I appreciate the plaintiff's dilemma in this matter, the fact remains that the threatened presentation of a winding-up petition by the defendant against it is solely due to the plaintiff's own default in failing to complete the sale within the time stipulated as ordered by the court.

In its affidavit, the plaintiff has mentioned that it has appealed to the Supreme Court against the order given by George J but if indeed the plaintiff feels strongly about any form of execution that may be levied against it by the defendant, the only course open to the plaintiff is to apply to have execution on the order of court stayed. There is no indication that such a cause of action has been taken and the plaintiff cannot now by the devious method of filing this originating summons hope to obtain the very order which it had failed to get to prevent the defendant proceeding to execute the order of court dated 13 February 1988.

In any event, on the facts of this case, by reason of the plaintiff's default in failing to specifically perform the sale and purchase agreement dated 1 February 1986, and by the very nature of the consequential order granted by George J on 13 February 1988, it is my considered opinion that the defendant is a prospective creditor of the plaintiff and under s 217(1)(b) of the Act, it is entitled to present a winding-up petition against the plaintiff based on the order of court dated 13 February 1988.

On that finding, I dismiss this originating summons with costs to be paid by the plaintiff to the defendant.

Application dismissed.

Solicitors: *Ms Murthi & Partners*; *Mah-Kok & Din.*

Reported by *Ng Sheau Jiuan*

Chong Fok Shang & Anor v Lily Handicraft & Anor

HIGH COURT (PENANG) – CIVIL SUIT NO 22-95-87
WAN ADNAN J
8 APRIL 1989

Civil Procedure – Interim injunction – Restraining passing-off – Serious question to be tried – Balance of convenience – Whether damages adequate compensation

Trade Marks – Infringement of trade mark – Injunction to restrain passing-off – Principles determining whether trade mark infringed – Trade Marks Act 1976

The first plaintiff previously carried on business under the name and style of Macy Fashion which was involved in the retailing and wholesale of yarns. He was the original registered proprietor of the trade mark 'Minlon' bearing No M/71743 (hereinafter referred to as 'the trade mark'). The second plaintiff was incorporated to purchase and otherwise acquire and take over as a going concern the business of Macy Fashion together with its assets and liabilities. By a deed of assignment dated 10 April 1986 the second plaintiff took an assignment of and became entitled to the trade mark. Upon application made to the Registrar of Trade Marks, Malaysia the second plaintiff was registered as proprietor of the trade mark as from 10 April 1986. On 1 June 1982 the second plaintiff entered into a licence agreement with Minlon Industries (M) Sdn Bhd allowing the latter to manufacture yarns and threads bearing the plaintiff's trade mark 'Minlon'. The first defendant is a firm of which the second defendant is the sole proprietress. In or around March 1986 the defendants put in the market and were selling knitting yarns in the label bearing the trade mark 'Winlon'. By this application the plaintiffs are asking for an interim injunction restraining infringement of the plaintiffs' rights.

Held, allowing the plaintiffs' application:

(1) At this stage of the litigation it is no part of the court's function to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and considerations. These matters are to be dealt with at the trial.

(2) Judging from the sound and appearance of the two words 'Minlon' and 'Winlon', the learned judge found that the defendants' mark 'Winlon' so nearly resembles the plaintiffs' trade mark 'Minlon' as to be likely to deceive or cause confusion. The mark 'Winlon' used by the defendants would lead persons of average intelligence into accepting the knitting yarns of the defendants as and for the knitting yarns of the plaintiffs.

(3) The learned judge found that there is a serious question to be tried. After considering the balance of convenience, he found that if the plaintiffs succeed they would not be adequately compensated by damages. If the plaintiffs fail the defendants would be adequately compensated under the plaintiffs' undertaking in damages. As disclosed in the affidavit of a director of the second plaintiff, the paid-up capital of the second plaintiff was $450,000. The annual turnover is about $6.3 m. The plaintiffs would be able to pay any award of damages against them.

Cases referred to

1 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (refd)
2 *The Pianotist Company Ltd* (1906) 23 RPC 774 (refd)
3 *Iron-Ox Remedy Ltd* v *Co-operative Wholesale Society Ltd* (1907) 24 RPC 425 (refd)

Legislation referred to

Trade Marks Act 1976 ss 33(3)(a), 35, 38, 45, 46, 50, 55(2)

Ahmed Ainuddin bin Mohd Noordin for the plaintiffs.
Ranjit Rai Sharma for the defendants.

Cur Adv Vult

Wan Adnan J: The plaintiffs' application is for the following orders:

(1) That the first and second defendants and each of them whether acting by themselves their partners or proprietors (as the case may be) servants or agents or any of them or otherwise howsoever be restrained until further order, in the meantime from doing the following acts or any of them that is to say:

(a) Manufacturing, packaging, importing, exporting, ordering, purchasing, offering for sale, selling, supplying, distributing, disposing of or parting with the possession otherwise than to the plaintiffs or their solicitors, or their authorised agents or otherwise howsoever dealing in or with any knitting yarns with a label bearing the word 'Winlon' or any other word similar to 'Winlon'.